MERRICK B. GARLAND
Attorney General
MICHAEL G. WHEAT, CBN 118598
JOSEPH J.M. ORABONA, CBN 223317
JANAKI G. CHOPRA, CBN 272246
COLIN M. MCDONALD, CBN 286561
ANDREW Y. CHIANG, NYBN 4765012
Special Attorneys of the United States
880 Front Street, Room 6293
San Diego, CA 92101
619-546-8437/7951/8817/9144/8756
Andrew.Chiang@usdoj.gov

Attorneys for the United States of America

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, v. KEITH MITSUYOSHI KANESHIRO (1), DENNIS KUNIYUKI MITSUNAGA (2), TERRI ANN OTANI (3), AARON SHUNICHI FUJII (4), CHAD MICHAEL MCDONALD (5), SHERI JEAN TANAKA (6), Defendants.	CR No. 22-00048-TMB-NC UNITED STATES' MOTION *IN LIMINE* NO. 12: TO ADMIT EVIDENCE OF SHERI TANAKA'S INTIMIDATION OF GRAND JURY WITNESS (REDACTED) **PUBLICLY FILED**

UNITED STATES' MOTION *IN LIMINE* NO. 12: TO ADMIT EVIDENCE OF DEFENDANT SHERI TANAKA'S INTIMIDATION OF GRAND JURY WITNESS (REDACTED)

INTRODUCTION

This prosecution features powerful defendants who used their money and resources to corrupt Hawaii's judicial institutions. The defendants, the United States will prove, bent the system to their will to punish and imprison Laurel Mau, because she stood up to them by filing a lawsuit. At the front lines of their conspiracy stood a lawyer—Defendant Sheri Tanaka—who acted as MAI's legal muscle and who subverted the justice system in order to advance the goals of the conspiracy.

As the lawyer for MAI (and the agent for the MAI defendants), Tanaka engaged in a variety of conduct to distort the truth-seeking function of the judicial process. The jury has already heard evidence that Tanaka lied to a federal judge about discovery in Mau's lawsuit against MAI. By lying to the judge, Tanaka struck down two birds with one mendacious stone: she successfully (1) concealed a trove of emails detailing MAI's deepening relationship with Keith Kaneshiro, and (2) buried key evidence that would have otherwise fleshed out Mau's claim of retaliation in the civil case. As the trial continues, the jury will hear more about Tanaka's manipulation of the judicial process—from her spoon-feeding prosecutors doctored, slanted, and misleading evidence about Mau, to her spearheading the effort to stonewall the grand jury and cover up the truth about the charged conspiracy.

The United States now requests the Court's approval to introduce another piece of evidence: Tanaka's intimidation of a grand jury witness. A witness is expected to testify that soon upon learning about her grand jury appearance, Tanaka

picked her up, drove her out of the city to an unfamiliar location in the hills, and instructed her to exit the car without her cell phone. There, on the side of the road, Tanaka began speaking to the witness about the grand jury investigation. After the witness objected and told Tanaka she did not wish to continue the conversation, Tanaka's demeanor changed. Tanaka became very serious and began instructing the witness what to say to the grand jury about political contributions.

This evidence constitutes probative "other act" evidence under FRE 404(b). Tanaka's attempt to isolate, intimidate, and control a future grand jury witness is evidence of her and her co-conspirators' knowledge about the criminal conspiracy and their consciousness of guilt. The incident in question occurred during the grand jury investigation before the witness was scheduled to testify. It is corroborated by phone records showing communications between the witness, Tanaka, and another MAI defendant during the relevant time period. And it is consistent with the nature, scope, and brazenness of other examples of Tanaka's obstructive conduct that this Court has authorized the United States to present.

There is good cause under FRE 404(b)(3)(C) to excuse the lack of pretrial notice. The United States was not aware of this information until it interviewed this witness on Wednesday, March 27. The FBI immediately prepared a 302 report and the United States sent a notice letter to the defense the next day. In addition, the United States does not anticipate calling this witness until next week at the earliest. Therefore, the defense has sufficient time to prepare for her testimony.

BACKGROUND

[redacted]

The following dates and testimonies provide necessary context for this motion.

I. [redacted]'S GRAND JURY TESTIMONY

[redacted]

[redacted] See ECF 288, United States Sealed Unredacted Response to Misconduct Motions, at 15–16.

II. [redacted] INTERVIEW ON MARCH 27, 2024

Fast forward to Wednesday, March 27, 2024, when the United States interviewed [redacted] for the first time to prepare for her upcoming trial testimony. During that interview, [redacted] disclosed the existence of a previously unknown encounter between her and Tanaka in the summer of 2021 during the grand jury investigation. See Ex. 1, March 28 Notice Letter and Enclosed FBI Report.

According to [redacted], after the FBI notified her about her upcoming grand jury appearance, Tanaka called her and asked to meet with her. At the time, [redacted] was in Los Angeles staying with [redacted] accepted, thinking she and Tanaka would just be going out to lunch together.

But they did not go to lunch. Instead, Tanaka picked [redacted] up and drove them out of the city into an unknown location in the hills. When they reached a residential area, Tanaka pulled over on the side of the road. [redacted] did not know

where they were. Tanaka got out of the car and instructed [redacted] to leave her cell phone in the car. Tanaka explained to [redacted] that the reception there was bad—but this explanation did not make sense to [redacted].

When they were both outside the car, Tanaka began to talk to [redacted] about what the grand jury was investigating. At that point, [redacted] tried to stop the conversation by telling Tanaka she did not want to hear about it. When [redacted] said this, Tanaka's demeanor changed. She became very serious. In spite of [redacted]'s desire to stop their conversation, Tanaka proceeded to tell [redacted] that the grand jury was inquiring into political contributions. Tanaka then instructed [redacted] to say "no" if the grand jury asked her about whether she had made political contributions.[1]

[redacted]'s gut told her that something was wrong and that Tanaka was not acting like a legitimate attorney in that situation. When Tanaka drove [redacted] home, they made small talk, but it felt weird to [redacted]. After the incident, [redacted] told both her husband and daughter to not speak with Tanaka anymore.

III. CORROBORATING PHONE RECORDS

Phone tolls records corroborate [redacted] account of her encounter with Tanaka. On July 19, 2021, the FBI called [redacted] to notify her that she would be called to

[1] At that point in time, it is not clear what Tanaka knew about [redacted]'s donation history (or lack thereof) and Otani's use of [redacted]'s name to make straw donations. So Tanaka's final instruction to [redacted]—about saying "no" to making political contributions—is somewhat unclear. What is significant, however, is that the surrounding facts, especially in tandem with the remainder of the grand jury obstruction evidence, paint a clear picture about Tanaka's intentions with [redacted].

the grand jury to testify. Immediately after that call, [redacted] called Otani. In the ensuing week, [redacted], Tanaka, and Otani exchanged many calls with each other.

DISCUSSION

The chilling tactics employed by Tanaka is evidence that she tried to isolate [redacted], intimidate her, and shape her testimony for the grand jury. There is no other reason why Tanaka would drive [redacted] to a strange location [redacted] did not expect to go. Nothing else explains why Tanaka would pull over on the side of the road and order [redacted] to leave her cell phone in the car. The eerie circumstances made Tanaka's bad intentions clear: she planned to strong arm [redacted] into testifying a certain way without incurring the risk of being seen or recorded.

It does not matter whether [redacted] succumbed to Tanaka's effort (she didn't). What matters is that Tanaka targeted a witness with potentially adverse testimony and then engaged in a blatant effort to shape that testimony. The potential ambiguity in Tanaka's ultimate instruction to [redacted] is of no moment. Tanaka might claim she was simply instructing [redacted] to tell the truth—in that (1) [redacted] did *not* make political donations; (2) the contributions in her name were straw donations from Otani; ergo (3) Tanaka's instruction to [redacted] to say "no" if the grand jury asked her about making contributions was proper. Yet this is not the least bit plausible.[2] Why would an attorney take a grand jury witness to an unfamiliar area,

[2] If, after that whole ordeal, Tanaka did simply instruct [redacted] to tell the truth, [redacted]'s refusal to play ball with Tanaka explains why. [redacted] had refused to follow Tanaka into discussions about the grand jury investigation. It quickly became

pull over on the side of the road, instruct the witness to leave her cell phone behind, just to engage in a roadside conversation about telling the truth? In any event, it does not matter what Tanaka actually said to [redacted]: her heavy-handed attempt to shape a grand jury witness's testimony speaks for itself. Like the obstructive antics of multiple Tanaka-represented witnesses in the grand jury, Tanaka's drive into the hills with [redacted] represents yet another effort to prevent the truth of the conspirators' crimes from being revealed under the light of day.

The Court should permit the United States to introduce this evidence under FRE 404(b) as knowledge and consciousness-of-guilt evidence.

I. THE EVIDENCE MEETS 404(b) REQUIREMENTS

The newly discovered evidence about [redacted]'s encounter with Tanaka passes muster under the Ninth Circuit's test for Rule 404(b) evidence.

First, the evidence "tends to prove a material point." *United States v. Lague*, 971 F.3d 1032, 1038 (9th Cir. 2020). "[E]vidence of conduct designed to impede a witness from testifying truthfully may indicate consciousness of guilt and should be placed before the trier of fact." *United States v. Brashier*, 548 F.2d 1315, 1325 (9th Cir. 1976). [redacted]'s testimony will show that Tanaka sought to isolate, intimidate, and control her, before [redacted] pushed back and insisted she did not wish to talk about the grand jury. Although Tanaka may try to claim she was simply instructing

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evident that [redacted] was not a witness whom Tanaka could control. Forging ahead in an attempt to convince [redacted] to lie would be a fool's errand.

[redacted] to tell the truth, the totality of the bizarre circumstances indicate Tanaka's original plan was to have [redacted] do precisely the opposite.

Second, the evidence is "not too remote in time." *Lague*, 971 F.3d at 1038. The pertinent timing consideration here is when the authorities were looking for proof of the underlying crime. Here, Tanaka's obstructive conduct occurred during the time when the grand jury was conducting its investigation into the conspiracy.

Third, "the evidence is sufficient to support a finding that defendant committed the other act[.]" *Lague*, 971 F.3d at 1038. [redacted]'s expected testimony is credible. It is corroborated by toll records. As importantly, [redacted]'s testimony potentially cuts against the interest of [redacted]. See *Schreiber Revocable Trust v. Estate of Knievel*, 984 F.Supp.2d 1099, 1103 (D. Nev. 2013) (finding testimony "highly credible, given that his testimony was against his own potential interest").[3]

II. THE EVIDENCE IS NOT BARRED BY RULE 403

Exclusion of evidence under FRE 403 is "an extraordinary remedy to be used sparingly because it permits the trial court to exclude otherwise relevant evidence." *United State v. Layton*, 767 F.2d 549, 554 (9th Cir. 1985). The rule is "limited to excluding matter of scant or cumulative probative force, dragged in by the heels for

[3] The requirement of similarity is relevant only "in certain cases," *United States v. Bailey*, 696 F.3d 794, 799 (9th Cir. 2012), such as to prove intent. *United States v. Hadley*, 918 F.2d 848, 851 (9th Cir. 1990). The evidence here is not being used to prove intent. The requirement of similarity does not apply.

the sake of its prejudicial effect." *United States v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000). [redacted]'s account of her meeting with Tanaka is not something with "scant or cumulative probative force." It paints a vivid picture of witness intimidation—the jury is more than entitled to hear about it. Furthermore, any risk of undue prejudice can be mitigated with a limiting instruction, which this Court has already approved with respect to Tanaka's other acts of grand jury obstruction. See Court's Limiting Instruction No. 5, ECF 593 at 7.

III. GOOD CAUSE EXISTS TO EXCUSE LACK OF PRIOR NOTICE

This Court may excuse lack of pretrial notice "for good cause" if the prosecution provides written notice "in any form during trial." FRE 404(b)(3)(C). There is good cause to excuse the lack of pretrial notice in this case. The United States did not learn about the evidence until Wednesday, March 27, 2024, when it interviewed [redacted] for the first time and [redacted] made the revelation. The United States could not provide pretrial notice with respect to evidence it did not know about. As soon as we learned about it, however, the FBI immediately prepared a report, which we sent to the defense along with a notice letter on March 28.[4]

Courts have consistently excused lack of pretrial notice when the prosecution did not know about the evidence before trial. See *United States v. Scholl*, 166 F.3d 964, 976 (9th Cir. 1999) ("good cause was shown because, prior to trial, the

[4] Although the letter was emailed to defense counsel in the late hours of March 28, email records show the letter landed in their mailboxes at 12:00 a.m. on March 29.

government believed that the incident had occurred in 1990, not 1986"); see also *United States v. Lopez-Gutierrez*, 83 F.3d 1235, 1241 (9th Cir. 1996) ("there was good cause to excuse the pretrial notice requirement" because "the evidence was not made available to the government until the night before trial"). The United States did not learn about this evidence until [redacted] revealed it last Wednesday. Nor did the we have reason to be aware of it. Although [redacted] testified in the grand jury in August 2021, she did not disclose the existence of this encounter with Tanaka.

Courts have also found good cause when measures are taken to mitigate potential prejudice to the defense. See *Lopez-Gutierrez*, 83 F.3d at 1241 (prejudice was offset by making witness available to defense prior to testimony and producing relevant reports and evidence); see also *United States v. Holmes*, 111 F.3d 463, 468 (6th Cir. 1997) (possibility of prejudice removed when court "postponed [witness] testimony for five days, thereby giving the defense time to prepare"); cf. *United States v. Perez-Tosta*, 36 F.3d 1552, 1562 (11th Cir. 1994) (reasonableness of notice depends in part on "what measures" were taken for defense "to meet the evidence"). Here the United States immediately provided notice to the defense and enclosed the FBI report of [redacted]'s interview. [redacted] is not expected to testify until next week at the earliest. Because the defendants will have at least one week to prepare for her testimony, the Court should find good cause and allow it into evidence.

CONCLUSION

The Court should grant the United States' Motion in Limine No. 12.

Dated: April 2, 2024

Respectfully submitted,

MERRICK B. GARLAND
Attorney General

/s/ Andrew Y. Chiang
MICHAEL G. WHEAT
JOSEPH J.M. ORABONA
JANAKI G. CHOPRA
COLIN M. MCDONALD
ANDREW Y. CHIANG
Special Attorneys of the United States

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, v. KEITH MITSUYOSHI KANESHIRO (1), DENNIS KUNIYUKI MITSUNAGA (2), TERRI ANN OTANI (3), AARON SHUNICHI FUJII (4), CHAD MICHAEL MCDONALD (5), SHERI JEAN TANAKA (6), Defendants.	CR No. 22-00048-TMB-NC CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that:

I, Andrew Y. Chiang, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, CA 92101-8893. I am not a party to the above-entitled action. I have caused service of the foregoing on all parties in this case by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 2, 2024. */s/ Andrew Y. Chiang*
ANDREW Y. CHIANG

EXHIBIT 1

U.S. Department of Justice

MERRICK B. GARLAND
Attorney General

San Diego County Office
Federal Office Building
880 Front Street, Room 6293
San Diego, California 92101-8893

Michael G. Wheat *(619) 546-8437*
Joseph Orabona *(619) 546-7951*
Janaki G. Chopra *(619) 546-8817*
Colin M. McDonald *(619) 546-9144*
Andrew Y. Chiang *(619) 546-8756*
Special Attorneys of the United States

March 28, 2024

Via Email
Birney B. Bervar, bbb@bervar-jones.com
John M. Schum, john@johnschum.com
Nina Marino, marino@kaplanmarino.com
Jennifer Lieser, lieser@kaplanmarino.com
Jessica Ann Szemkow, ja.szemkow@outlook.com
Ryan Mitsos, mitsos@kaplanmarino.com
Doris Lum, doris@dorislumlaw.com
Andrew M. Kennedy, andrew@kona-lawyer.com
Thomas M. Otake, thomas@otakelaw.com
Crystal Gail K. Glendon, crystalglendonlaw@gmail.com
Mark Mermelstein, mmermelstein@holmestaylor.com
Andrew S. Cowan, acowan@holmestaylor.com

Re: *United States v. Kaneshiro, et al.*, CR 22-00048-TMB-NC (D. Haw.)
Notice Under FRE 404(b)(3) Regarding Evidence of E
between Defendant Sheri Jean Tanaka and Witness [redacted]
during the Grand Jury Investigation of this Case

Dear Counsel:

The United States provides notice under FRE 404(b)(3) of its intent to introduce evidence of an uncharged act relevant to prove knowledge and consciousness of guilt. Yesterday, on March 27, 2024, the United States learned about the existence of an encounter between Defendant Sheri Jean Tanaka and [redacted], who is expected to testify as a witness in this trial. Although the incident occurred prior to [redacted]'s grand jury testimony in August 2021, this information was not reported to the United States until late afternoon yesterday. The enclosed FBI 302 report provides a summary of the incident as it was communicated to the United States by [redacted] during her in-person interview.

According to [redacted], she received a call from Tanaka while [redacted] was in Los Angeles staying with her daughter, [redacted]. Tanaka requested a meeting with [redacted]. [redacted] agreed, thinking they were going to get lunch together. But they did not go to lunch. Instead, after picking [redacted] up, Tanaka drove [redacted] out of the city into a residential area in the hills. Tanaka then stopped on the side of the road, got out of the car, and told [redacted] to leave her phone in the car. After [redacted] and Tanaka got out of the car, Tanaka informed [redacted] that the grand jury investigation was about political contributions, and instructed [redacted] that if she were asked about whether she had made political contributions, she should say no.

Tanaka's conduct was an attempt to exert pressure on [redacted] to not reveal information to the authorities about campaign contributions and about Defendant Terri Ann Otani's use of [redacted], as straw contributors to Keith Kaneshiro and other political candidates. Tanaka's effort to exert pressure on [redacted] was similar to Otani's effort to exert pressure on [redacted] to not speak with the authorities—both were designed to obstruct the grand jury's investigation and to conceal evidence of the conspiracy to bribe Kaneshiro with campaign money. Like Otani's conduct, Tanaka's efforts to obstruct the grand jury, tamper with a witness, and conceal information about the criminal conspiracies, constitute "other act" evidence under FRE 404(b) relevant to show the defendants' knowledge about the conspiracies as well as their consciousness of guilt.

The United States learned about Tanaka's attempt to cover up the conspiracy just yesterday and has endeavored to notify defense counsel (and prepare and enclose a FBI 302 report) as quickly as possible. Because this evidence is highly probative, and because we are disclosing it within a day of learning about it, we believe there is good cause to excuse the lack of pretrial notice (indeed we had no opportunity to give notice). This evidence is proof of a material element—knowledge—of the crimes for which Tanaka and her co-conspirator are charged. The strong temporal nexus to the grand jury investigation provides additional probative value. Moreover, the probative value is not substantially outweighed by the risk of undue prejudice under FRE 403, for the same reasons why the Court has permitted evidence of Otani's obstructive conduct and witness tampering. Also, the Court has already approved a limiting instruction for this very purpose of addressing obstructive conduct in the grand jury.

Therefore, the United States hereby provides notice under FRE 404(b)(3). The United States will file a motion *in limine* to introduce this evidence in order to present the issue to the Court and give the defendants a reasonable opportunity to respond.

Respectfully,

MERRICK B. GARLAND
Attorney General

/s/ Andrew Y. Chiang
MICHAEL G. WHEAT
JOSEPH ORABONA
JANAKI G. CHOPRA
COLIN M. MCDONALD
ANDREW Y. CHIANG

Special Attorneys of the United States

ENCLOSURE

FD-302 (Rev. 5-8-10)

FEDERAL BUREAU OF INVESTIGATION

Date of entry 03/28/2024

On March 28, 2024, [redacted], telephone number [redacted], previously interviewed, was interviewed at the Honolulu United States Attorney's Office. Also present was Special Attorney for the United States Michael Wheat. After being advised of the identities of the interviewing personnel and the nature of the interview, [redacted] provided the following information:

[redacted] was accompanied by her attorney, Christian Enright, telephone number [redacted], who was present during the interview.

After [redacted] received her grand jury subpoena, Sheri Tanaka (TANAKA) called her. [redacted] received the call while she was in Los Angeles staying at the apartment of her daughter, [redacted] TANAKA asked to meet with [redacted] TANAKA picked [redacted] up outside of [redacted]'s apartment. TANAKA picked [redacted] up in some type of sports car.

[redacted] thought they were going to get lunch or something, however, TANAKA drove out of the city into the hills. During the drive, someone called TANAKA and asked if a wife can testify against her husband. [redacted] did not know who it was that called.

TANAKA stopped on the side of the road in a residential area in the hills. [redacted] was not very familiar with the Los Angeles area and did not know where exactly it was they stopped. TANAKA got out of the car and told [redacted] to leave her phone in the car. TANAKA's only explanation for leaving the phone in the car was that the reception was really bad, which did not make sense to [redacted]

When they got out of the car, TANAKA said she would tell [redacted] what the case was about. [redacted] told TANAKA that she did not want to hear about it. After this, TANAKA's demeanor changed. She became very serious. TANAKA said the case was about political contributions and that if [redacted] was asked if she made contributions to say no.

[redacted] had a gut feeling that something was wrong and she felt like TANAKA was not acting as a legitimate attorney would during their

Investigation on 03/27/2024 at Honolulu, Hawaii, United States (In Person)

File # [redacted] Date drafted 03/28/2024

by NELSON ROBERT JOHN

conversations in 2021.

When they drove back to drop [redacted] off, they just made small talk, however, it felt weird.

After [redacted] received her grand jury subpoena she called Terri Otani (OTANI). OTANI was surprised and angry that [redacted] received a subpoena.

After [redacted]'s experience with TANAKA, [redacted] told her husband, [redacted] and [redacted] not to talk to TANAKA.

[redacted] listened to Government Exhibit 2-3, which she identified as a voice mail she received from OTANI. [redacted] did not believe she ever called OTANI after receiving the voice mail from her. They did have some text conversations with OTANI saying that [redacted] must not care about her any more. [redacted] told her she could not discuss the matter. They also had some text conversation about OTANI's health and some health products [redacted] helped OTANI order.

[redacted] did not have any contact with TANAKA after the meeting in Los Angeles. [redacted] did see TANAKA in the hallway at the court house when she appeared before the grand jury.

[redacted] was instructed not to refer to Katherine Kealoha or to the [redacted] case during her testimony.

In addition, [redacted] confirmed information previously provided.